

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

United States of America,

Criminal No. 08-128 (RHK/JJG)
Civil No. 10-2596 (RHK)

Plaintiff,

vs.

ORDER

Edward Lee Smith,

Defendant.

Before the Court is Defendant's Motion filed pursuant to 28 U.S.C. § 2255. By way of background, Defendant was convicted of two (2) drug offenses and sentenced to 120 months in prison on each count to run concurrently. The conviction and sentence were affirmed on appeal. 581 F.3d 692 (8th Cir. 2009). In the Motion now before this Court, he asserts ineffective assistance of counsel because trial counsel did not request a Franks hearing.

As the Eighth Circuit said in this case, "to warrant a Franks hearing, a defendant must make a strong threshold showing of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." 581 F.3d at 695. In this matter, counsel did not formally request a Franks hearing; however, it is clear from the proceedings before Magistrate Judge Graham that defense counsel was essentially offered such a hearing at the Motion hearing and allowed to, and did, inquire into the circumstances surrounding the seizure of trash from the Defendant's residence.

Under these circumstances, the requested habeas relief is not warranted and must be denied.

Accordingly, and upon all the files, records and proceedings herein, **IT IS ORDERED** that Defendant's Motion Under 28 U.S. C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (Doc. No. 72) is **DENIED**.

Dated: November 8, 2010

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge